

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

SHARON WILLIAMS, A minor,
by and through her mother
and next friend, INEZ WILLIAMS

PLAINTIFF

vs.

Civil Action No. 2:94cv97-D-O

ILLINOIS CENTRAL RAILROAD
COMPANY, ROBERT H. POTEETE
and JAMES K. BRADLEY

DEFENDANTS

MEMORANDUM OPINION

This matter is before the undersigned on the motion of the plaintiff to remand this cause to the Circuit Court of Leflore County, Mississippi. The plaintiff's motion is well taken, and is therefore GRANTED.

FACTUAL BACKGROUND

The plaintiff Sharon Williams originally filed this action in the Leflore County Circuit Court on July 13, 1993. After having been served with process, defendant Illinois Central Railroad removed the case and now it is before this court.

Plaintiff's claims surround an incident which occurred in Greenwood, Mississippi, on July 13, 1990. Sharon Williams was injured when her foot was caught between two railroad cars attempting to connect. Her complaint charges negligence and gross negligence against the defendants. Defendant R.H. Poteete was the conductor of the train at the time of the incident, and defendant

James K. Bradley was the engine driver of the train at the time. Defendant Illinois Central owned the train and was the employer of both Poteete and Bradley.

DISCUSSION

The plaintiff asserts that the removal petition filed by defendant Illinois Central was defective, in that all of the defendants did not join in the petition. See Farias v. Bexar County Board of Trustees, 925 F.2d 866, 871 (5th Cir. 1991) (all defendants must normally join in a petition for removal). According to the documents and exhibits submitted to this court, however, defendant Illinois Central was the only defendant who had been served with process at the time the petition for removal was filed. A defendant is not obliged to wait until all codefendants are served before removing an action to federal court. Miranti v. Lee, 3 F.3d 925, 929 (5th Cir. 1993). The removal is not improper merely because the unserved defendants did not join in the petition for removal. Jones v. Houston Independent School Dist., 979 F.2d 1004, 1007 (5th Cir. 1992); Smith v. Arkansas Blue Cross and Blue Shield, 781 F.Supp. 1159, 1161 (N.D. Miss. 1991).

Once the case was removed to federal court, federal law governed the service of process on parties. Velten v. Daughtrey, 226 F.Supp. 91, 92 (Mo. 1964); see also Howse v. Zimmer Mfg. Inc., 109 F.R.D. 628, 631 (D. Mass. 1986). Congress provided for this

particular situation by statute, providing that service of process on the parties may be completed or new process upon the parties may be issued as if the action were originally filed in this court. 28 U.S.C. § 1448. Defendant Poteete was served with process in compliance with Federal Rule of Civil Procedure 4, via personal service upon his person after the notice of removal was filed, and is now properly before this court. Defendant Bradley, however, has yet to be served with process, and this court holds no personal jurisdiction over him. Having determined that the removal was procedurally proper, this court must now determine if remand is warranted by the facts of the case.

This court is required to remand to state court any case over which it has no subject matter jurisdiction. Buchner v. F.D.I.C., 981 F.2d 816, 817 (5th Cir. 1993). Defendant Illinois Central, in its petition for removal, asserts that this court has jurisdiction over this cause based on diversity of citizenship among the parties involved. 28 U.S.C. § 1332. There is no other arguable basis for federal jurisdiction in this case. Further, if the plaintiff's citizenship is not diverse as to any of the defendants, this court does not even possess jurisdiction to hear this action. Jernigan v. Ashland Oil, 989 F.2d 812, 814 (5th Cir. 1993). While all parties agree that defendant R.H. Poteete is a resident of Mississippi, and therefore a non-diverse party to the plaintiff, defendants contend that he was fraudulently joined in this action

to defeat diversity. Therefore, defendants contend, Poteete's citizenship should not be considered in determining this court's jurisdiction. Jernigan, 989 F.2d at 815. The task before this court is clear - if Poteete was fraudulently joined as a defendant, remand to the state court is improper. If, however, Poteete was not fraudulently joined in this action, this court has no jurisdiction in this case and it will be required to remand this cause back to state court.

Where charges of fraudulent joinder are used to establish [federal] jurisdiction, the removing party has the burden of proving the claimed fraud To prove their allegation of fraudulent joinder [removing parties] must demonstrate that there is no possibility that [plaintiff] would be able to establish a cause of action against them in state court. In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party. We are then to determine whether that party has any possibility of recovery against the party whose joinder is questioned.

Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992).

The party may also establish fraudulent joinder by showing that there was outright fraud in the plaintiff's pleading of jurisdictional facts. Jernigan, 989 F.2d at 815; B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981). The movant carries an extremely heavy burden in establishing fraudulent joinder. Jernigan, 989 F.2d at 815; B., Inc., 663 F.2d at 549. This court is not to "pre-try" the case in determining removal jurisdiction, but it may consider summary judgment-type evidence such as affidavits and deposition testimony. Carriere v. Sears,

Roebuck and Co., 893 F.2d 98, 100 (5th Cir. 1990).

The defendants do not appear to dispute the jurisdictional facts regarding the parties as set forth in the plaintiff's complaint. Therefore, to determine if Poteete was fraudulently joined, this court must now determine if the plaintiff has any possibility of recovering under her claim. In her complaint, the plaintiff charges Poteete with various allegations of negligence, most involving the operation of the train on the night in question and the failure to warn or operate warning devices in conjunction with the operation of the train. In support of its claim of fraudulent joinder, defendants rely upon an affidavit by Poteete in which he states that he was not on the train at the time of the incident, but was some 1000 feet away. Even if the entirety of the affidavit is taken as true by this court, it is insufficient to carry the burden of persuasion required of the defendants. Poteete's absence from the train and his inability to detect Ms. Williams' presence might itself be sufficient to constitute negligence on his part, permitting her to recover on a claim against him. This court cannot say that it would be impossible for her to establish a claim against Poteete in state court.

Also in support of the position that Ms. Williams has no possibility of prevailing on a claim against Poteete, defendants rely upon Miss. Code Ann. § 77-9-236. Defendants take the phrase that the railroad company "shall stand in the place of the train

crew," and conclude that Poteete cannot be liable under Mississippi law for the allegations in the plaintiff's complaint. The defendants have taken this language out of context, and in reality it affords them no protection from claims of negligence. This section of the Mississippi Code states:

§ 77-9-236 Obstructing highways and streets; **criminal responsibility of crew** complying with orders of employer

No member of a train crew, yard crew or engine crew of a railroad which is a common carrier **shall be held criminally responsible** or found guilty of violating any state laws or of any municipal ordinances regulating or intended to regulate the blocking of any street, road or highway grade crossings by trains or passenger or freight cars upon reasonable proof that the blocking of said street, road or highway grade crossings was necessary to comply with the orders or instructions, either written or oral, of his employer or its officers or supervisory officials . . . and provided further, that the employer or railroad shall stand in the place of the member of the train crew, yard crew or engine crew **in such circumstances and shall be responsible for the violation of any such state laws or municipal ordinances and any criminal fines resulting therefrom . . .**

Miss. Code Ann. § 77-9-236 (Supp. 1993) (emphasis added).¹ The plain wording of the statute and the obvious intent of the Mississippi legislature was to prevent the imposition of **criminal** liability upon railroad workers, and not to limit any civil liabilities that they might incur. This provision does not affect the plaintiff's claim of negligence against Poteete.

¹ This version of the statute was enacted by the Mississippi legislature in 1992. Defendants cite the court to the prior version, which was enacted in 1975. The 1992 enactment makes no changes from the 1975 version which are relevant to the case at hand.

CONCLUSION

This court cannot say that there "is no possibility" that the plaintiff would be able to state a cause of action against Poteete in state court. As such, the defendants have failed to meet their burden to show that Poteete was fraudulently joined in this cause to defeat diversity jurisdiction. In that there is not complete diversity among the parties in this action, and since there is no other basis for exercising federal jurisdiction over this matter, this court must remand this cause to the Circuit Court of Leflore County, Mississippi. The plaintiff's motion will be granted.

A separate order in accordance with this opinion shall issue this day.

THIS _____ day of October, 1994.

United States District Judge

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ORDER

Pursuant to a memorandum opinion issued this day, it is hereby
ORDERED THAT:

1) Plaintiff's motion to remand this case to the Circuit Court
of Leflore County, Mississippi is hereby GRANTED.

All memoranda, depositions, affidavits and other matters
considered in granting the plaintiff's motion to remand are hereby
incorporated and made a part of the record in this cause.

SO ORDERED, this the _____ day of October, 1994.

United States District Judge